No. 79747-1
(Court of Appeals No. 56171-5-I)

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of

ANDRE BRIGHAM YOUNG

STATE'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Petitioner Andre Brigham Young's entire adult life has been characterized by his inability to follow rules and societal expectations. One of those expectations is that persons will obey court orders. Under Washington's collateral bar rule, Young cannot challenge the lawfulness of the order entered by the Hon. Richard Jones, which required him to participate in a video deposition and a mental health evaluation with the State's chosen expert. Faced with Young' willful refusal to obey a lawful court order, Judge Jones acted well within his discretion by finding Young in contempt and imposing a sanction designed to bring about Young's compliance with the trial court's order. Because the Court of Appeals committed no error by granting the State's motion on the merits and dismissing Young's appeal, this court should affirm.

II. STATEMENT OF THE CASE

A. Facts Underlying Young's Civil Commitment

Respondent Young is well known to Washington and federal appellate courts. *E.g.*, *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993); *Seling v. Young*, 531 U.S. 250 (2001). At the age of 49, respondent was civilly committed as a sexually violent predator in 1991 following a lengthy history of rape and sexual assault. *See generally In re Young*, 122 Wn.2d at 13-17 (recounting facts and commitment trial). His commitment was

affirmed by this court in *In re Young*, but remanded for a trial addressing less restrictive alternatives (LRA). *Id.* at 60. An LRA trial was held in 1994 where the jury rejected Young's placement in a less restrictive setting.

Since his commitment, respondent's case has been annually reviewed under the provisions of RCW 71.09.090 and RCW 71.09.070 to determine if he remains a sexually violent predator. *See In re Young II*, 120 Wn. App. 753, 755-56, 86 P.3d 810 (2004) (recounting review history). During this entire time, respondent Young has refused all treatment services offered by the SCC. *See Id.* at 759 (quoting trial court). A refusal to engage in treatment is highly problematic given the chronic nature of his underlying mental condition. *Id.* He has maintained good physical health and condition. *Id.*

In 2004, despite his lack of sex offender treatment progress, the Court of Appeals, Division I, ordered a recommitment trial based on the theory that Mr. Young's advancing age alone was sufficient to justify a new trial under RCW 71.09.090.[1] The matter was eventually mandated back to the trial court for the recommitment trial proceeding. At this recommitment trial, the burden is on the State to prove beyond a reasonable doubt that "the

[1] In 2005 amendments to RCW 71.09, the Legislature disapproved of the *In re Young II* analysis and amended the statute to preclude a new trial based on age alone. *In re Smith*, 137 Wash.App. 319, 325, 153 P.3d 226 (2007).

committed person's condition remains such that the person continues to meet the definition of a sexually violent predator." RCW 71.09.090(3)(b)

For the recommitment trial, the State retained an expert, Doctor Harry Hoberman, for the purpose of conducting a sexually violent predator evaluation of Mr. Young. CP 97. Under RCW 71.09.090(3)(a), the State has the right . . . to have experts evaluate" Young. Dr. Hoberman requested an opportunity to conduct a forensic interview and psychological testing of Mr. Young for the purpose of his sexually violent predator evaluation. Id. In addition, on March 4, 2004, the State gave notice that it would take a video deposition of Mr. Young on April 5, 2005 and April 6, 2005.

Mr. Young objected to the forensic interview and psychological testing by the State's expert. He moved the court for a protective order directing that he is not required to participate in an interview by Dr. Hoberman. Mr. Young also filed a motion to quash the deposition notice.

On March 21, 2005, the superior court, through the Hon. Richard Jones, denied Mr. Young's motion and ordered him to submit to an interview with the State's expert. CP 118-119. The court also denied Mr. Young's motion to quash the video deposition and ordered him to participate in the State's deposition. *Id.* The court's order provided that "[f]ailure to comply with this Order may result in the imposition of

appropriate sanctions." *Id.* at 119.

On March 23, 2005, through his counsel, Mr. Young provided "formal notice" that he "will not appear at his deposition on April 4 and 5, 2005" and that he "will not appear for the interview with Dr. Hoberman on April 7 and 8, 2005." CP 126, 137. Mr. Young's decision in this regard directly conflicted with the March 21, 2005 order and the trial court's scheduling order.

On April 1, 2005, Judge Jones entered an order finding Mr. Young in contempt for his refusal to comply with the requirements of the March 21, 2005 Order. CP 159-162. In open court, the court confirmed Young's refusal to comply with the March 21, 2005 order. *Id.* at 160. The contempt order provided that Mr. Young's "refusal to comply with the order of this court is done willingly and intentionally" and that "[i]t remains within respondent Young's power to comply with the court's order requiring his attendance and participation at his deposition and the interview with Dr. Hoberman." Id.

As a remedial coercive sanction, the court stayed all trial proceedings until Mr. Young purged his contempt by meeting with Dr. Hoberman and completing the deposition. Id. Judge Jones found that a stay was "[t]he remedial sanction most reasonably calculated to result in respondent's compliance with this court's order." *Id.* at 160. He further determined that

lesser coercive sanctions were "unlikely to secure Mr. Young's compliance with the court's order and would work to the prejudice of the ability of the State to present its case." *Id.* Judge Jones left open "the possibility of a progressive sanction, including jail, if the stay fails to secure Mr. Young's compliance with the March 21, 2005 order." *Id.*

B. Young's Request to Review the March 21, 2005 Order

At the same time that he was refusing to comply with the evaluation and deposition order, Young sought reversal of that order through discretionary review in Ct. App. No. 55988-5-I. He did not obtain a stay pending his request for discretionary review.

On August 25, 2005, Commissioner Neel denied discretionary review. *See* Attached App. 1. The Commissioner noted that RCW 71.09.090(3)(a) "unambiguously permits the State to have Young evaluated by experts of its choosing." Commissioner's Ruling at 3. The Commissioner rejected Young's argument that the provisions of CR 35 controlled the evaluation: "In light of the [*In re Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002)] "special proceedings" analysis, Young has not demonstrated that CR 35 is applicable to a post commitment proceeding or that the State must demonstrate good cause for a forensic evaluation." Commissioner's Ruling at 3. Citing to *Williams*, the Commissioner also rejected Young's argument that it was error to compel a video deposition.

Id. A panel denied Young's motion to modify.

Young sought review of the Court of Appeals decision through a motion for discretionary before the Supreme Court, which was assigned Supreme Ct. No. 78087-1. On February 24, 2006, Commissioner Crooks denied discretionary review and noted his agreement "with the analysis set forth by" Commissioner Neel. *See* attached Appendix 2. As to the mental examination issue, Commissioner Crooks held that "I am not persuaded that CR 35 can be layered on RCW 71.09.090(3) any more than it can be layered on RCW 71.09.040(4)." Ruling Denying Review at 2.

Young filed another motion to modify. On May 6, 2006, Department II unanimously denied Young's motion. *See* attached Appendix 3. A Certificate of Finality was issued on June 29, 2006.

C. Young's Appeal of the Contempt Order

Young also sought review of the April 1, 2005 contempt order. Because a contempt order is appealable as a matter of right, Young's notice of appeal had the effect of removing jurisdiction from the trial court and staying all subsequent contempt proceedings. *See* RAP 7.2. (generally removing trial court jurisdiction upon acceptance of review); RAP 6.1 (review accepted upon timely filing of a notice of appeal).

Following briefing under RAP 10, the State filed a motion on the merits. Commissioner Neel granted the State's motion. *See* attached

Appendix 4. Although Young complained of the underlying mental evaluation and deposition order, the Commissioner correctly held that "Young may not collaterally attack the underlying order requiring him to participate in the evaluation and deposition." Commissioner's ruling at 5. The Commissioner found that "[t]he issue on appeal is clearly without merit, and the trial court order is affirmed." Commissioner's Ruling at 7. "The contempt finding was not an abuse of discretion, and as in [*In re Broer*, 93 Wn. App. 852, 858, 957 P.2d 281 (1998)], staying the trial proceedings until Young complied with the trial court's order was not error." *Id.* A panel of the Court of Appeals denied Young's motion to modify.

Young filed a "motion for discretionary review," which this court treated as a petition for review. On October 2, 2007, Department II referred the matter to the En Banc Conference. On November 1, the court accepted review of the Court of Appeals decision.

III. LEGAL ARGUMENT

The State's primary arguments in this appeal are set forth in its February 22, 2006 "State's Response Brief" that was filed before the Court

of Appeals. The State files this supplemental brief to address a few issues raised in Young's reply brief and his "motion for discretionary review."

A. The Collateral Bar Rule Precludes Young's Efforts to Undermine the March 21, 2005 Order Requiring His Participation in a Mental Health Evaluation and a Video Deposition

Young attempts to collaterally attack the statutory evaluation order through various arguments that the coercive sanction of a stay is "grossly unfair." Mo. for Disc. Rev. at 12. He claims that he should not be held in contempt or sanctioned merely due to his "disinclination to submit to extremely invasive psychological testing." *Id.* He further claims that he should not be sanctioned due to the "vast information" available to the State from sources other than the ordered evaluation. *Id.* These arguments are nothing but thinly veiled attempts to question the order underlying the contempt finding. The March 21, 2005 order is not open to challenge in the course of contempt proceedings regardless of Young's "disinclinations" or beliefs that it is somehow "unfair" to force him to follow a lawful court order.

Washington's collateral bar rule prohibits a party from attacking in a contempt proceeding the underlying order alleged to have been violated. *State v. Coe*, 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984). "The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person

must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" *Maness v. Meyers,* 419 U.S. 449, 459, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975), quoting *United States v. United Mine Workers*, 330 U.S. 258, 293, 67 S.Ct. 677, 91 L.Ed.2d 884 (1947).

Young's implicit and explicit efforts to attack the court order underlying his contempt cannot free him of his contempt for violating that orders. As this court has explained, a party commits contempt even where the underlying order is wrong so long as the court had jurisdiction to enter the order: "(W)here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt." *Mead School Dist. No. 354 v. Mead Ed. Ass'n (MEA)*, 85 Wash.2d 278, 280, 534 P.2d 561 (1975) (citations omitted).

In the current case, there is no argument available to Young that the underlying orders were entered without jurisdiction. The deposition and mental evaluation order was properly entered. Young's effort's to set aside the March 21, 2005 order through review proceedings was denied, including his final request for review from this court. *See* App. 2 & 3. As a result, Young's decision to refuse compliance with the March 21, 2005 order properly earned him contempt or court.

B. The Trial Court Had Authority to Hold Young in Contempt for Refusing a Court Order to Participate in the Mental Health Examination and the Video Deposition

The trial court had two independent reasons to hold Young in contempt for his willful violation of the March 21, 2005 order. First, Young refused the court order to participate in the mental health evaluation with Dr. Hoberman. Second, Young refused the court order to participate in the State's video deposition of Young. Either violation supports the finding of contempt.

1. The Trial Court Had Ample Authority to Hold Young In Contempt for Refusing to Participate in the Mental Health Examination that was Authorized by Statute

The State will not repeat the arguments made in its response brief. *See* pp. 7-10. Young's position that CR 37 applies to the evaluation authorized in RCW 71.09.090(3) remains wholly incompatible with this court's analysis in *Williams*. In refusing to apply CR 35 to RCW 71.09, this court noted that the creation of a right to evaluation by statute resulted in a "special proceeding" that precluded application of CR 35 to SVP proceedings. 147 Wn.2d at 488. A similar analysis was adopted by the Court of Appeals in the 1998 *Broer* case. 93 Wn. App. at 856. Because the statutory evaluation procedures in RCW 71.09 are wholly separate from CR 35, Young cannot claim application of CR 37 to preclude a

finding of contempt.

Nonetheless, even if CR 37 applied, Young's conclusion that CR 37 overrides the contempt statute, RCW 7.21, fails to correctly analyze the interplay between a court procedural rule and Washington's contempt statute. The provisions of CR 37 cannot trump the contempt statute in the manner suggested by Young.

This court has recognized an appropriate role for the Legislature in regulating contempt. As held in *Mead School Dist. No. 354*, the Legislature may act to regulate the court's power to impose contempt "as long as it does not diminish it so as to render it ineffectual." 85 Wn.2d at 287. Here, application of RCW 7.21 to find Young in contempt of court for violations of the March 21, 2005 order does not diminish the court's power to enforce its orders. To the contrary, the civil and criminal contempt provisions in RCW 7.21 enhance the remedies available to enforce court orders by supplementing the remedies found in CR 37.

The apparent fact that this court drafted CR 37 in such a way as to limit the *inherent authority* of a trial court to find contempt for violation of a mental examination order cannot prevent the Legislature from creating an alternative avenue to contempt through RCW 7.21. "Unless the legislatively prescribed procedures and remedies [for contempt] are specifically found inadequate, courts should adhere to them and are not

free to create their own." *Mead,* 85 Wash.2d at 288, 534 P.2d 561. Thus, under *Mead*, the Legislature is free to adopt more expansive approaches to contempt than those expressed in CR 37 as arising out of the trial court's inherent contempt powers.

In addition, Young is overly simplistic in his claim that court rules prevail over inconsistent statutes. Mo. for Disc. Rev. at 6. The actual rule is that "When a court rule and a statute conflict, the nature of the right at issue determines which one controls." *State v. W.W.,* 76 Wash.App. 754, 758, 887 P.2d 914 (1995). "If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails." *Id.*

There can be little doubt that RCW 7.21 is substantive law. Importantly, the statute creates the *crime* of contempt of court, which is a gross misdemeanor. RCW 7.21.040. It is the province of the Legislature to define the elements of a crime. *State v. Wadsworth,* 139 Wash.2d 724, 734, 991 P.2d 80 (2000). Young cites no authority recognizing a judicial power to eliminate a substantive criminal statute by adoption of a court rule. In the same way that CR 37 cannot operate to eliminate criminal contempt under RCW 7.21, it also cannot preclude the exercise of civil contempt to remedy violation of a court order. *See In re Hercules Enterprises, Inc.* 387 F.3d 1024, 1028 (9th Cir. 2004)(The removal of express contempt authority from a court rule does not deprive the court of

statutory authority to exercise contempt powers because contempt powers "are substantive and are left to statutory and judicial development, rather than procedural rules.").

In the end, CR 37 does not apply. The contempt order was well within the trial court's statutory and inherent contempt powers. The court has statutory authority to enter "[a]n order designed to ensure compliance with a prior order of the court." RCW 7.21.030(2)(c). In addition to its statutory powers, the trial court has inherent contempt powers derived from "the long-exercised power of constitutional courts." *Graves v. Duerden*, 51 Wn. App. 642, 647, 754 P.2d 1027 (1988). This court should reject Young's effort to avoid compliance with the March 21, 2005 order by hobbling the trial court's authority to enforce its orders through contemp.

2. The Trial Court Had Ample Authority to Hold Young In Contempt for Refusing to Participate in the Video Deposition

In his opening brief and reply brief before the Court of Appeals, Young argued that the trial court lacked authority to hold him in contempt for refusing a deposition. The State responded to this argument. State's Response Brief at 10-13. In his motion for discretionary review, Young concedes this point:

> To the extent the civil rules govern the refusal to submit to a deposition, contempt is a permissible finding for a refusal, as long

> as the deposition request is not conducted in bad faith or in an effort to embarrass, annoy, or oppress the deponent. CR 37(a) (permitting contempt finding); CR 30(d) permitting termination or limitation on deposition),

Mo. for Disc. Rev. at 10 n. 5. Given Young's concession, this court should hold that a party may be held in contempt for refusing a *court order* to participate in a deposition. The trial court should be affirmed on this basis alone.

C. The Sanction of a Stay Was an Appropriate Coercive Sanction Designed to Secure Young's Compliance with the Court's Orders

Several times in his briefing, Young pejoratively claims that the trial court held him in contempt in order to "punish" him *See* Motion for Discretionary Review at 2, 3 & 12. In making this assertion, Young ignores the fundamental difference between "civil contempt" and "criminal contempt." As Division I recently explained:

> A contempt sanction is coercive, and thus civil in nature, when the contemnor can avoid the sanction by doing something to "purge" the contempt. In such a case the contemnor " 'carries the keys of his prison in his own pocket.' " *International Union, United Mine Workers v. Bagwell,* 512 U.S. 821, 828, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) quoting *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). A contempt sanction is punitive, and thus criminal in nature, when it is imposed to punish completed acts of disobedience without providing an opportunity to purge the contempt.

In re Mowery, ___ Wn. App. ___, 169 P.3d 835, 841 (2007).

In accord with the contempt statute, the sanction of a stay was not

designed to "punish" Young for violating the March 21, 2005 order, but to encourage his immediate compliance with the order. Through civil contempt, Young has the ability to remove the sanction at any time merely by complying with the trial court's lawful order. In other words, "the contemnor 'carries the keys of his prison in his own pocket' and can let himself out simply by obeying the court order." *In re Interests of M.B.*, 101 Wn. App. 425, 439 (2000).

In evaluating a the trial court's sanction of a stay, it should be remembered that Young initiated the recommitment trial proceeding with his petition for release under RCW 71.09.090(2). Young filed a report from his expert witness claiming that he no longer met civil commitment criteria due to his advancing age. Young cannot initiate a recommitment trial and then force the State to defend Young's indefinite commitment, while Young simultaneously refuses to engage in the statutorily required evaluation by the State's expert. In this regard, Young stands in no better position than the plaintiff that sues a defendant for medical injuries and then refuses discovery into those injuries. A stay merely preserves the status quo ante while simultaneously coercing Young to participate in the evaluation if he wishes to proceed to trial.

Although pointed out in the State's Response Brief, Young never explains how he can challenge the contempt sanction while simultaneously

failing to assign error to Judge Jones' findings of fact in the contempt order. The trial court considered a variety of sanctions, including jail and stay of the proceedings. *See* VRP 4/1/2005 at 11-20. In the end, Judge Jones determined that:

> The remedial sanction most reasonably calculated to result in respondent's compliance with this court's order regarding the deposition is to stay the proceedings until he purges his contempt. The court has considered lesser coercive sanctions, but finds that they are unlikely to secure Mr. Young's compliance with the court's order and would work to prejudice the ability of the State to present its case. The court will consider the possibility of a progressive sanction, including jail, if the stay fails to secure Mr. Young's compliance with the March 21, 2005 order.

CP 160 (attached as Appendix). Because Young has not assigned error to this finding of fact, it is a verity on appeal.

Despite this finding of fact, Young argues that the State can somehow be made whole though a different sanction. Young's argument, however, misses the point. "The ***primary purpose*** of the civil contempt power is to coerce a party to comply with an order or judgment." *State v. Breazeale*, 144 Wn.2d 829, 842 (2001) (emphasis added); *accord Smith v. Whatcom County District Court*, 147 Wn.2d 98, 105 2002). The *Broer* court rejected a similar argument in affirming Broer's contempt:

> Broer also suggests that the court should have chosen as an alternative to contempt a directive to the State to proceed on the basis of information about Broer that it already had. But the court was not required to accept such an alternative in view of the statute's specific requirement that a mental evaluation is required as part of the proceeding.

93 Wn.App. at 866. It would be inconsistent with this "primary purpose" of the contempt statute to allow Young to escape with a minor sanction of his choosing while it remains possible to coerce compliance with the trial court's order.

Because of the current appeal and Young's hope for legal intervention, he has yet to face the reality that only his compliance with the court's orders will remove the stay. The stay imposed by the trial court is an appropriate initial means to bring about Young's compliance with the March 21, 2005 order.

IV. CONCLUSION

For the foregoing reasons, the Court of Appeals decision dismissing Young's appeal should be affirmed.

DATED this 3rd day of December 2007.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Detention of ANDRE BRIGHAM YOUNG, Petitioner, v. STATE OF WASHINGTON, Respondent.	No. 55988-5-I COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW

In this sexual predator proceeding, petitioner Andre Brigham Young seeks discretionary review of the trial court order compelling him to submit to an examination by the State's expert at the Special Commitment Center (SCC) under RCW 71.09.090(3)(c), including a clinical/forensic interview and psychological written testing, and compelling him to submit to a video deposition under CR 30. For the reasons stated below, discretionary review is denied.

In 1991, Young was committed to the SCC as a sexually violent predator (SVP). In 2001, he retained an expert, Dr. Howard Barbaree, who evaluated Young and opined that due to his advanced age, Young's risk of reoffending was so reduced that he no longer met the criteria for an SVP. In 2004, this court concluded that Young had made a prima facie showing that he is no longer a sexually violent predator and reversed and remanded for trial under RCW 71.09.090. In re Detention of Young, 120 Wn. App. 753, 86 P.3d 810 (2004).

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In preparation for trial, the State retained an expert, Dr. Harry Hoberman, for the purpose of evaluating Young. The State requested that Young submit to a psychological evaluation and testing. The State notified Young that it would take a video deposition and had scheduled Dr. Hoberman to interview Young. Young objected to the forensic interview and psychological testing and sought a protective order that he not be required to participate. Young also filed a motion to quash the video deposition.

On March 21, 2005, the trial court denied Young's motion for a protective order and motion to quash. The court ordered Young to submit to a clinical/forensic interview and written psychological testing as soon as practicable.[1] Only Dr. Hoberman, Young, and Young's counsel may be present; Young's counsel may observe the examination, but may not interfere. Young must answer all questions except those that relate to matters for which he could still be criminally prosecuted. The court also ordered Young to submit to a video deposition under CR 30. Finally, the court ordered that failure to comply with the orders may result in the imposition of appropriate sanctions.

Young notified the State that he would not participate in the evaluation or the deposition and filed and noted a motion for discretionary review. The motion was continued at Young's request. I heard argument on July 22, 2005. In the meantime, the trial court found Young in contempt for refusing to comply with the order and stayed all trial court proceedings until Young purged his contempt.

[1] The order gave the State leave to "reapply for a PPG and polygraph examination as part of the forensic evaluation by [Dr.] Hoberman."

Young has filed a notice of appeal of this order (No. 56171-5-I); the appeal is proceeding separately.

Young seeks discretionary review under RAP 2.3(b)(2), arguing that ordering him to participate in the forensic evaluation and video deposition constitutes probable error that substantially alters the status quo. Young argues: RCW 71.09.090(3) does not authorize the trial court to order a compelled forensic examination with the State's retained expert; CR 35 applies, but the State failed to make an application for the evaluation under the rule; the State failed to demonstrate good cause for the evaluation; and the deposition is unnecessary, where the State has frequently gathered evidence during Young's lengthy confinement at the SCC. Young also argues that the case presents an issue of first impression that will evade review unless discretionary review is granted. At oral argument, Young took the position that the State is entitled to some type of evaluation, but the key question is its scope. Relying on the concurring opinion in In re Williams, 147 Wn.2d 476, 55 P.3d 597 (2002), he argued that RCW 71.09.090 provides no limit on the scope of an evaluation, that the court must set limits, and that to avoid a potentially invasive evaluation, the State must meet the CR 35 good cause requirement ("the order [for a physical or mental examination] may be made only on motion for good cause shown . . . ").

Young has not demonstrated probable error. RCW 71.09.090(3)(a) unambiguously permits the State to have Young evaluated by experts of its choosing:

> [At a conditional release or unconditional discharge hearing], . . . the state . . . shall have a right to . . . have the committed person evaluated by experts chosen by the state. The committed person shall also have . . . the right to have experts evaluate him or her on his or her behalf . . . .

In Williams, the court considered whether the State was entitled to a precommitment mental examination under CR 35, where the alleged SVP had already been evaluated by the Department of Social and Health Services (DSHS) under the authority of RCW 71.09.040. The court concluded that because SVP proceedings are "special proceedings" within the meaning of CR 81 (governing the applicability of civil rules), the SVP statute controls and CR 35 is inapplicable:

> The statue expressly provides for postcommitment evaluation, but it makes no mention of evaluations during pretrial discovery. *CR 35 is inconsistent with the special proceedings set out in chapter 71.09 RCW.* We hold that the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4).

(emphasis added) Williams, 147 Wn.2d at 491. In reaching this conclusion, the court contrasted a postcommitment release proceeding under RCW 71.09.090, which specifically provides for an evaluation by experts chosen by the State. Williams, 147 Wn.2d at 491. In light of the Williams "special proceedings" analysis, Young has not demonstrated that CR 35 is applicable to a postcommitment proceeding or that the State must demonstrate good cause for a forensic evaluation.

Moreover, as RCW 71.09.090 permits, Young has been evaluated by his own expert, Dr. Barbaree. In remanding for trial, this court anticipated a "complete evaluation" so that the State could challenge Dr. Barbaree's opinion and the trier of fact could determine whether Young continues to meet the

definition of an SVP. Young, 120 Wn. App. at 762. To date, the trial court order is limited to requiring Young to submit to a clinical/forensic interview and written tests.

Finally, the court in Williams concluded that the trial court erred in quashing the video deposition the State sought:

> The Court of Appeals correctly concluded that the trial court abused its discretion in issuing the order because there was no basis in the record to quash the deposition. Chapter 71.09 RCW does not address the videotaping of depositions. Therefore, the civil rules are not inconsistent with the statute and are applicable to this issue. CR 30(b)(8) allows a party to videotape the deposition of another party without leave of court . . . .

147 Wn.2d at 492. Young has not demonstrated a reason to reach a different conclusion here.

In light of Williams, Young has not demonstrated that the trial court order compelling him to submit to an evaluation consisting of a clinical/forensic interview and written testing and requiring him to submit to a video deposition constitute probable error. Discretionary review is not warranted. Now, therefore, it is hereby

ORDERED that discretionary review is denied.

Done this 11th day of August, 2005.

Mary S. Neel
Court Commissioner

THE SUPREME COURT OF WASHINGTON

In re the Detention of
ANDREW BRIGHAM YOUNG

NO. 78087-1

RULING DENYING REVIEW

Andre Young was committed under chapter 71.09 RCW, as a sexually violent predator, in 1991. He is now seeking to show, using the procedure established by RCW 71.09.090, that he no longer meets the definition of a sexually violent predator and should therefore be discharged. In an earlier appeal, the Court of Appeals concluded that Mr. Young had made a prima facie showing that entitled him to an evidentiary hearing. *In re Detention of Young*, 120 Wn. App. 753, 86 P.3d 810, *review denied,* 152 Wn.2d 1035 (2004). On remand, the superior court on the State's prehearing motion ordered Mr. Young to submit both to an examination by an expert for the State, under RCW 71.09.090(3)(a), and to a video deposition, under CR 30. Mr. Young moved for discretionary review of that order, but the Court of Appeals denied review. RAP 2.3. Mr. Young now moves for discretionary review by this court. RAP 13.5.[1]

I agree with the analysis set forth by Court of Appeals Commissioner Neel in her ruling denying discretionary review. The superior court committed neither obvious nor probable error in ordering Mr. Young to submit to both an expert's examination and a video deposition. Like Commissioner Neel, and contrary to

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[1] Meanwhile, the superior court has found Mr. Young to be in contempt for refusing to comply with its examination and deposition order. Mr. Young's appeal from that contempt order is currently pending before the Court of Appeals. No. 56171-5-I.

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Mr. Young's contention, I read this court's opinion in *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002), as supporting both aspects of the superior court's decision. Specifically as to the examination issue, I am not persuaded that CR 35 can be layered on RCW 71.09.090(3) any more than it can be layered on RCW 71.09.040(4).

In short, the Court of Appeals did not err in denying discretionary review, nor is the intervention of this court otherwise called for under RAP 13.5(b). The motion for discretionary review is denied.

COMMISSIONER

February 24, 2006

THE SUPREME COURT OF WASHINGTON

In re the Detention of: ANDRE B. YOUNG, Petitioner, v. STATE OF WASHINGTON, Respondent.	NO. 78087-1 **ORDER** C/A NO. 55988-5-I King County No. 02-2-07983-1

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens and J. M. Johnson, considered this matter at its May 2, 2006, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 3rd day of May, 2006.

For the Court

Henry J. Alexander
CHIEF JUSTICE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Detention of ANDRE B. YOUNG, Appellant, v. STATE OF WASHINGTON, Respondent.	)	No. 56171-5-I COMMISSIONER'S RULING GRANTING MOTION ON THE MERITS TO AFFIRM

In this sexual predator proceeding, Andre B. Young appeals the trial court order holding him in contempt for refusing to participate in a clinical/forensic interview with the State's retained expert and refusing to participate in a video deposition. The State filed a motion on the merits to affirm under RAP 18.14(a). The issues on appeal are clearly without merit. RAP 18.14(e). The motion is granted, and the trial court order is affirmed.

FACTS

In 1991, Young was committed to the Special Commitment Center (SCC) as a sexually violent predator (SVP). In 2001, he retained an expert, Dr. Howard Barbaree, who evaluated Young and opined that due to his advanced age, Young's risk of reoffending was so reduced that he no longer met the criteria for an SVP. In 2004, this court concluded that Young had made a prima facie showing that he is no longer a sexually violent predator and reversed and

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remanded for trial under RCW 71.09.090. In re Det. of Young, 120 Wn. App. 753, 86 P.3d 810 (2004).

In preparation for trial, the State retained an expert, Dr. Harry Hoberman, for the purpose of evaluating Young. The State requested that Young submit to a psychological evaluation and testing. The State notified Young that it would take a video deposition and had scheduled Dr. Hoberman to interview Young. Young objected to the forensic interview and psychological testing and sought a protective order that he not be required to participate. Young also filed a motion to quash the video deposition.

On March 21, 2005, the trial court denied Young's motion for a protective order and motion to quash. The court ordered Young to submit to a clinical/forensic interview and written psychological testing as soon as practicable. Only Dr. Hoberman, Young, and Young's counsel might be present, and Young's counsel might observe the examination, but not interfere. Young was required to answer all questions except those that relate to matters for which he could still be criminally prosecuted. The court also ordered Young to submit to a video deposition under CR 30. Finally, the court ordered that failure to comply with the orders might result in the imposition of appropriate sanctions.

Young notified the State that he would not participate in the evaluation or the deposition and filed and noted a motion for discretionary review.[1] I denied

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1 In re Det. of Andre B. Young, No. 55988-5-I.

the motion for discretionary review[2], a panel of judges denied Young's motion to modify[3], and the Supreme Court denied discretionary review.[4]

In the meantime, on April 1, 2005, the trial court found Young in contempt for refusing to comply with the order and stayed all trial court proceedings until Young purged his contempt. The trial court entered written findings and conclusions, which include:

I. FINDINGS OF FACT

> D. In open court on April 1, 2005, Mr. Young confirmed that he was refusing to comply with the requirements of the March 21, order. Mr. Young's refusal to comply with the order of this court is done willingly and intentionally. His refusal to appear at, and participate in, the deposition and interview constitutes contempt of court.
>
> E. It remains within [appellant] Young's power to comply with the court's order requiring his attendance and participation in his deposition and the interview with Dr. Hoberman.
>
> F. The remedial sanction most reasonably calculated to result in [Mr. Young's] compliance with this court's order regarding the deposition is to stay the proceedings until he purges his contempt. The court has considered lesser coercive sanctions, but finds that they are unlikely to secure Mr. Young's compliance with the court's order and would work to prejudice the ability of the State to present its case. The court will consider the possibility of a progressive sanction, including jail, if the stay fails to secure Mr. Young's compliance with the March 21, 2005 order.

II. CONCLUSIONS OF LAW

> A. [Mr. Young] is in contempt of court under RCW 7.21.010(1)(b) & (c).

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2 Commissioner's Ruling Denying Discretionary Review, August 11, 2005.
3 Order Denying Motion to Modify, November 16, 2005.
4 Commissioner's Ruling Denying Discretionary Review, No. 78087-1, February 24, 2006; Order Denying Motion to Modify, May 3, 2006.

> B. The court has the authority to place [Mr. Young] in civil contempt under RCW 7.21, CR 37, and the court's inherent authority to enforce its orders.

The court struck the trial date and ordered that all trial proceedings are stayed and Young shall remain at the SCC until he purges his contempt by completing his deposition and interview in accord with the March 21, 2005 order.

Young appeals this order.

MOTION ON THE MERITS CRITERIA

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the . . . commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

Applying these criteria in light of State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985), the issue on appeal is clearly without merit.

DECISION

Young contends that the trial court lacked authority to find him in contempt and stay his trial for refusing to submit to the evaluation and deposition. Specifically, he contends that the civil rules apply to SVP proceedings, that CR 37 is the rule applicable to discovery violations, that CR 37(b)(2)(D) precludes contempt as a sanction for a party's failure to comply with an ordered mental examination, that CR 37(b)(2) precludes contempt as a sanction for a party's failure to participate in a deposition without weighing the competing interests, and that imposing the sanction of indefinitely staying the

SVP proceeding is extremely harsh and unnecessary because there were other sanctions available, such as instructing the jury that Young refused to submit to an evaluation or deposition or that the State's failure to have a recent evaluation of Young should not be held against it, or limiting Young from calling his own expert at trial or barring him from introducing recent evaluations. Young also argues that the trial court abused its discretion in refusing to adopt lesser sanctions where Young has been in the State's custody for many years and it has a vast quantity of information on which it may proceed to trial.

Young's arguments fail for several reasons. First, in this challenge to the finding of contempt, Young may not collaterally attack the underlying order requiring him to participate in the evaluation and deposition. In re Det. of Broer, 93 Wn. App. 852, 858, 957 P.2d 281 (1998) (except for certain inapplicable exceptions, under the collateral bar rule a court order cannot be collaterally attacked in contempt proceedings arising from its violation). As noted above, Young's challenge to the order has been considered and rejected. Here, he is limited to challenging the trial court's decision to hold him in contempt for failing to participate in the evaluation and deposition, which is reviewed for an abuse of discretion. Broer, 93 Wn. App. at 863.

Second, in an analogous situation[5], the court in Broer rejected the same argument that CR 37(b)(2)(D) precludes contempt as a sanction for a party's failure to comply with an ordered mental examination:

> Broer next argues, on the basis of CR 37(b)(2)(D), that the trial court may not use contempt as a sanction for his failure to comply with an order to submit to a mental or physical examination. We disagree with this argument because, as we have already noted, the Civil Rules do not govern this special proceeding. Thus, CR 37(b)(2)(D) does not act as a bar to the use here of the sanction of contempt.
>
> While RCW 71.09.040 does not expressly address the court's power to enforce its order for a mental examination by holding the potentially sexually violent predator in contempt, the court has the inherent power to punish for contempt. Moreover, there is also statutory authority supporting the court's exercise of its power of contempt, [citing RCW 7.21.010, 030].

(footnotes omitted.) Broer, 93 Wn. App. at 864-65. And contrary to Young's argument, nothing in In re Det. of Williams, 147 Wn.2d 476, 55 P.3d 597 (2002), changes the Broer rule. In Williams, the court considered whether the State was entitled to a precommitment mental examination under CR 35, where the alleged SVP had already been evaluated by the Department of Social and Health Services (DSHS) under the authority of RCW 71.09.040. The court concluded that because SVP proceedings are "special proceedings" within the meaning of CR 81 (governing the applicability of civil rules), the SVP statute controls and CR 35 is inapplicable:

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[5] Broer involved an evaluation under RCW 71.09.040(4) after the trial court determined there was probable cause to determine that Broer was a sexually violent predator.

> The statue expressly provides for postcommitment evaluation, but it makes no mention of evaluations during pretrial discovery. *CR 35 is inconsistent with the special proceedings set out in chapter 71.09 RCW.* We hold that the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4).

(emphasis added.) Williams, 147 Wn.2d at 491. In reaching this conclusion, the court contrasted a postcommitment release proceeding under RCW 71.09.090, which specifically provides for an evaluation by experts chosen by the State. Williams, 147 Wn.2d at 491.

Moreover, the primary purpose of civil contempt is to coerce compliance with a court order. RCW 71.09.090(3)(a) unambiguously permits the State to have Young evaluated by experts of its choosing. To the extent there is any requirement for the trial court to consider lesser sanctions in this context, it plainly did so, finding that it was within Young's power to comply with the court's order and that lesser sanctions were unlikely to coerce Young's compliance and would prejudice the State's ability to present its case.[6] The contempt finding was not an abuse of discretion, and as in Broer, staying the trial proceedings until Young complied with the trial court's order was not error. Broer, 93 Wn. App. at 866.

The issue on appeal is clearly without merit, and the trial court order is affirmed. Now, therefore, it is hereby

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6 In remanding for trial, this court anticipated a "complete evaluation" so that the State could challenge the opinion of Young's expert. See also State v. Hutchinson, 135 Wn.2d 863, 881-82, 959 P.2d 1061 (1998).

ORDERED that the motion on the merits is granted and the decision of the trial court is affirmed.

Done this 6th day of September, 2006.

Mary S. Neel
Court Commissioner

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In Re the Detention of ANDRE BRIGHAM YOUNG, Respondent.	No. 02-2-07983-1 SEA ORDER FINDING RESPONDENT IN CONTEMPT ~~(proposed)~~

This matter came before the court on the State's motion for contempt. Having considered the State's motion, respondent Young's response, the State's reply, Mr. Young's statements in open court and the arguments of counsel, the court hereby enters the following:

I. FINDINGS OF FACT

A. On March 21, 2005, this court ordered respondent to submit to an interview with the State's retained expert, Dr. Harry Hoberman. The court also ordered respondent to participate in a video deposition. A copy of the court's order is contained in the file.

B. The State scheduled its deposition of Mr. Young for April 5-6, 2005. The State also scheduled a psychological interview of Mr. Young by Dr. Harry Hoberman, the State's retained

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expert, for April 7-8, 2005. These dates were scheduled in accord with the February 2005 Agreed Scheduling order.

C. Through his counsel, respondent Young has provided "formal notice" that Mr. Young "will not appear at his deposition on April 4 and 5, 2005" and that he "will not appear for the interview with Dr. Hoberman on April 7 and 8, 2005." As a result of this formal notice, the State cancelled the deposition and interview.

D. In open court on April 1, 2005, Mr. Young confirmed that he was refusing to comply with the requirements of the March 21, 2005 order. Mr. Young's refusal to comply with the order of this court is done willingly and intentionally. His refusal to appear at, and participate in, the deposition and interview constitutes contempt of court. Mr. Young was provided a right of allocution to explain his actions.

E. It remains within respondent Young's power to comply with the court's order requiring his attendance and participation at his deposition and the interview with Dr. Hoberman.

F. The remedial sanction most reasonably calculated to result in respondent's compliance with this court's order regarding the deposition is to ~~place respondent Young in the King County Jail~~ stay the proceedings until he purges his contempt. The court has considered lesser coercive sanctions, but finds that they are unlikely to secure Mr. Young's compliance with the court's order and would work to prejudice the ability of the State to present its case. The court will consider the possibility of a progressive sanction, including jail, if the stay fails to secure Mr. Young's compliance with the March 21, 2005 order.

II. CONCLUSIONS OF LAW

A. Respondent is in contempt of court under RCW 7.21.010(1)(b) & (c).

B. The court has the authority to place respondent in civil contempt under RCW 7.21, CR 37 and the court's inherent authority to enforce its orders.

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IT IS THEREFORE ORDERED THAT all trial proceedings are stayed and respondent shall remain at SCC until he purges his contempt ~~respondent Andre Brigham Young shall immediately be placed in the King County Jail, where he shall remain until he purges his contempt~~ of this court by completing his deposition and his interview in accord with the March 21, 2005 order. The trial date of June 13, 2005 is stricken during the period that respondent is in contempt of this court. The parties shall appear before the court on July 15, 2005 to review the status of the contempt. Mr. Young may appear by phone. The court shall hear Mr. Young's motion to substitute counsel on April 25, 2005 at 8:30 a.m. ~~keep the court informed of Mr. Young's willingness to purge his contempt.~~

DATED this 15 day of April, 2005.

HONORABLE RICHARD JONES, JUDGE

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